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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TOMMY CURTIS ECKMAN, Defendant and Appellant.	B204655 (Los Angeles County Super. Ct. No. KA079538)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed, with remand for resentencing.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette. Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Martynec, and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

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SUMMARY

Appellant was convicted of annoying children and crimes related to evading police and resisting arrest. He was sentenced to 81 years to life pursuant to the Three Strikes law. He challenges the sufficiency of the evidence as to the conviction for annoying children and asserts that the trial court abused its discretion by failing to strike his prior convictions and erred in imposing consecutive sentences. He also alleges prosecutorial misconduct during closing argument. We affirm the judgment but find that the trial court erred in imposing a felony sentence for appellant's conviction for annoying children, and remand for resentencing.

PROCEDURAL BACKGROUND

Appellant was charged in an amended information of annoying children in count 1, a violation of Penal Code[1] section 647.6, subdivision (c)(2) with a prior conviction of oral copulation in violation of section 288, subdivisions (a), (c); evading an officer, a violation of Vehicle Code section 2800.2, subdivision (a) in count 2; assault with a deadly weapon on a peace officer, a violation of section 245, subdivision (c) in count 3; and resisting an executive officer, a violation of section 69 in count 4. The amended information also alleged four prior felony strike convictions pursuant to sections 1170.12, subdivisions (a) through (e) and section 667, subdivisions (b) through (i), and prior convictions pursuant to sections 667.5, subdivision (b) and section 667, subdivision (a)(1). Appellant stipulated to the forcible oral copulation conviction alleged in count 1. Trial of the priors was bifurcated. A jury found him guilty as charged in each count. After waiver of jury on the priors, the trial court found each felony strike prior conviction alleged pursuant to sections 1170.12, subdivisions (a) through (e) and section 667, subdivisions (b) through (i) to be true. The trial court also found true one prior conviction alleged as to each count pursuant to section 667.5, subdivision (b) and one prior felony conviction alleged as to count 3 pursuant to section 667, subdivision (a)(1) to

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[1] All references are to the Penal Code unless otherwise stated.

be true. A *Romero*[2] motion to strike the section 1170.12, subdivisions (a) through (e) and section 667, subdivisions (b) through (i) priors was denied. Appellant moved to strike one or more of the priors because all of the strike priors arose from the same case and were committed against the same victim within a relatively short period of time. That motion was also denied. The trial court concluded that consecutive sentences were mandated pursuant to the Three Strikes law, and appellant was sentenced to three consecutive terms of 25 years to life, plus 5 years pursuant to section 667, subdivision (a)(1) and 1 year pursuant to section 667.5, subdivision (b), for a total of 81 years to life in state prison. The court also imposed fines and fees, and credited the appellant with 262 days in custody. Appellant filed a timely notice of appeal.

FACTUAL BACKGROUND

On June 16, 2007, 11-year-old Kyle and his sister, 13-year-old Karen, went with their parents to the Frank G. Bonelli Park in San Dimas. This is a large park with several hiking trails. Kyle wanted to show Karen a hiking trail that he had used many times but that Karen had not seen. While the two children were walking on the trail they saw a white Toyota Camry parked there. Kyle had never seen any car on this trail before, and he believed that cars were not allowed there because the trail was so narrow. Both children observed appellant Tommy Curtis Eckman sitting in the driver's seat of the Camry. As the two walked past, they observed that appellant was naked except for a towel on his lap. Kyle observed that appellant had one hand under the towel. Appellant was staring at the children as they walked by, and they both thought that he was "freaky-looking," which frightened them. Kyle and Karen then went onto a side trail. The children became frightened when appellant started the Camry's engine, and they jumped into some bushes to hide. Kyle and Karen both thought the man was going to take them away from their parents. Appellant drove the Camry slowly, stopping next to where the

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[2] *People v. Superior Court (Romero)* (1994) 13 Cal.4th 497.

two were hiding for approximately three minutes, and then drove up a hill to where one of the park exits was located.

When Kyle and Karen came out of the bushes the Camry suddenly turned around and drove down the hill toward them. The Camry accelerated and followed the children down the trail. Frightened, the children dove into what they described as a bamboo cave or hut in order to hide from appellant. Appellant then drove to the front of the cave entrance, and, with the vehicle facing the entrance, turned off the engine. Both children were frightened, fearing that appellant was going to kidnap them. They waited in the cave for ten minutes, hoping appellant would leave. He did not. They then exited the cave from the other side, encountering a thicket of bamboo and brush, then went through a streambed and walked through a grove of trees up a steep hill to another hiking trail.

While walking, they encountered two men, Joshua Hubbard and his friend. Hubbard was an off-duty police officer.[3] Hubbard and his friend were riding their bikes around Lake Puddingstone at Bonelli Park in the early afternoon. He observed that the children "had a look of concern on their face[s]." As soon as he passed the two children, around a curve in the trail, he observed a white Toyota parked on the shoulder of the trail. The engine was off and Hubbard rode his bike past the car, coming as close as a foot-and-one-half from it. Hubbard observed several cigarette lighters on the top of the dashboard. Appellant was seated in the driver's seat but was looking away as Hubbard passed by. Hubbard saw a blue towel on top of his lap. Appellant was sweating. Hubbard stopped his bike a distance behind the car and saw appellant moving about inside. Hubbard decided to go back to see if the two children he had seen were OK. As he did so, he went past the driver's side of the Toyota. Appellant again looked away. Hubbard could see that appellant was shirtless, but could not tell whether he was wearing shorts under the towel.

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[3] At the time of the incident, Hubbard was employed as a police officer by the Burbank Airport Police Department. By the time of the trial, he had moved on to the Los Angeles County Sheriff Department.

When Hubbard met up with the two children again, Kyle asked whether the white car was still there. Kyle told Hubbard that the man driving the white car had been chasing them and they had to jump out of the way, because he almost ran them off the road. Hubbard identified himself to the children as a police officer and told them that they were coming with him. Hubbard, his companion and the two children then went past the car again. Hubbard could see that appellant had the towel covering his groin area, and he could see skin on both sides of appellant's legs. As they drove by, appellant again looked in the opposite direction, avoiding Hubbard's gaze, and rolled up the car window, started the car engine and the car began to move forward. The four then went up the hill, where Hubbard called the Los Angeles County police. Hubbard then stayed with the children until their father arrived. He did not see any of the ensuing events.

Six uniformed Los Angeles County police arrived in response to a call of a man sitting in a car undressed or half-dressed, chasing and annoying little kids. The officers who arrived were all in full uniform and in four marked police vehicles. They were Officers Chambers, Sigala, Garcia, Mitchell, Norman and Decker. They observed the Toyota Camry on the hiking trail. No motorized vehicles are allowed on this trail, which is designed for "horses, people, mountain bikes, hiking." Chambers pulled his car in front of the Camry, facing it head-on. The officers exited their patrol vehicles, drew their weapons and told the appellant that they were police and demanded he get out. Instead of complying, appellant turned his vehicle around by making a series of sharp turns in the narrow space.

Appellant then drove away with the officers in pursuit in their vehicles. Chambers was in the lead car. The police vehicles had their red lights and sirens activated, and Officer Chambers believed that appellant saw the lights and heard the siren. Appellant drove to a deep trench about 20 feet deep and 20 feet wide where his vehicle could go no further, and the Camry became stuck in mud and sand. Appellant stopped there after running over a fire hydrant. The pursuit went for a distance of about one-half a mile, with appellant going as fast as 45 miles per hour on a hiking trail not intended for automobiles, in a forested part of the park. Two or three officers approached the Camry

and ordered appellant out, but he did not react. Appellant was reaching to the back seat to get his pants. Officer Chambers then took his baton and broke the driver's side rear window of the Camry. Appellant still did not get out. Chambers then sprayed appellant with "O.C. spray" in the face for five seconds. Chambers described the spray as a "hot sauce" that burns.

Instead of getting out of the vehicle, Chambers observed that appellant was putting on his pants. Appellant then exited his vehicle. His pants were partially on, but he was shirtless and shoeless. According to Chambers, appellant's pants "never came over his waist. They always stayed below his buttocks, and his penis was always showing." Appellant, who was listed at booking as 6 feet, 2 inches tall and weighing 300 pounds, then ran down the ravine, with Officers Chambers, Sigunes, Sigala and Garcia in pursuit. The officers engaged him at the bottom of the ravine, with appellant "fighting, putting up resistance . . . [he] never wanted to stop." One of the officers used a taser on appellant, which seemed to have some effect. Officer Chambers handcuffed appellant in the front. He did so because appellant "is not a small man, and I was thinking, if I handcuffed him in back, we would have a very hard time getting him up that 15-foot embankment. So I thought if I handcuffed him in front, he could help pull his own weight back up." But appellant was still not complying with the officers.

During this time, because of the high brush in the area and the heat of Chambers's car engine and catalytic converter, the car and adjacent brush caught on fire. Chambers's fellow officers ran up the slope to try to put out the fire with fire extinguishers, without success. This left Chambers to deal with appellant by himself. Chambers was having difficulty breathing because of the smoke. Appellant continued to resist by fighting, twisting, moving and crawling. At one point appellant kicked Chambers in the chest. Appellant dove into a thicket of bamboo and Chambers had to pull him out. Chambers fought with appellant for 40 minutes, until the fire department put out the fire and his partners were able to rejoin the fray. Appellant was tased a second time by Officer Garcia, and then by Officer Sigala. At one point in the melee, appellant grabbed a length of bamboo and, using it as a weapon, stabbed at Officer Sigala, striking him in the wrist,

breaking the skin and leaving a puncture wound. During the entire struggle with Officer Chambers, appellant's pants were down so that appellant's penis and buttocks were exposed.

Appellant testified in his own defense. He testified that he often went to the Puddingstone Lake area of the park to smoke crack cocaine in a glass pipe. He testified that he would hold the pipe with a towel because it was hot. He stopped on the trail in his white Toyota Camry to smoke the cocaine. He thought he was in a remote area and would be able to smoke without being seen. He would stop and smoke, then drive for a distance and then stop and smoke some more. At one point he saw two children walk by his car. He was wearing both a shirt and pants, and denied ever staring at the children. When the children passed by, his window was up and he was holding the pipe with the towel. When he got to the end of the trail at the creek, he turned around and started back, again stopping at different locations to smoke the cocaine pipe. He continued driving on the trail but did not drive in the same direction as the children nor did he see them jump into the bamboo cave. It was a coincidence that his car stopped at the cave entrance.

He further testified that, although he saw police cars behind, he did not know that they were pursuing him. He testified that he believed that his parole prohibited him from having contact with police, so he turned around and kept driving away from where the police were. His car eventually struck a fire hydrant and a tree. He tried to turn it around to avoid the police, and eventually got mired in mud. He saw the police flashing red lights but did not hear a siren. He swallowed the cocaine and threw the pipe away because he was afraid of being arrested for possession of cocaine.

Appellant testified that the men who ordered him out of the car did not identify themselves as police officers and he did not notice that they were in uniform. He tried to get some papers from his glove box, but the police broke the car window and he was sprayed in the face so he could not see anything. He did not resist as he was pulled from the car by his pants. He was feeling the effects of the cocaine and medication he had been taking for his paranoid schizophrenia and bipolar disorder. He denied attacking the

police, but they tased him several times and he was dragged on the ground and thrown down the ravine, and only grabbed a bamboo stick to maintain his balance.

Appellant denied that he was a child molester or that he had exposed himself to the children that day or any day. He further testified that he could not achieve an erection when he used cocaine. He testified that he was 6 feet, 1 inch tall and weighed 200 pounds and that he never weighed 300 pounds.

He admitted to a prior conviction for forcible sodomy of his then-wife in 1985 when he was 25 years old.

DISCUSSION

A. Sufficiency of the Evidence

Appellant contends that there was insufficient evidence to support his conviction for violation of section 647.6.[4] He does not dispute the sufficiency of the evidence relating to the other counts.

This court requested supplemental briefing on the issue of whether there was sufficient evidence of a felony as opposed to a misdemeanor violation of section 647.6 and, if not, whether the issue had been preserved for appeal. Violation of section 647.6 is a felony if the defendant has suffered a prior conviction for, among other felonies, violation of section 288, subdivision (a)(2) involving a minor under 16. Otherwise,

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[4] Section 647.6 provides:

"(a) (1) Every person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars ($5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.

[¶] . . . [¶]

"(c) (2) Every person who violates this section after a previous felony conviction under Section 261, 264.1, 269, 285, 286, 288a, 288.5, or 289, any of which involved a minor under 16 years of age, or a previous felony conviction under this section, a conviction under Section 288, or a felony conviction under Section 311.4 involving a minor under 14 years of age shall be punished by imprisonment in the state prison for two, four, or six years."

violation of section 647.6 is a misdemeanor. At no time did the prosecution offer evidence, nor did the defendant admit, that the prior conviction alleged in count 1 "involved a minor under sixteen years of age, . . . " as required by section 647.6, subdivision (c)(2) for it to be a felony. Prior to commencement of trial, the issue of the prior conviction alleged in the section 647.6 count was discussed. It was agreed that the appellant would stipulate to the prior conviction, and the ensuing occurred:

"[PROSECUTOR]: Tommy Curtis Eckman, do you stipulate that you suffered a conviction of oral copulation, in violation of Penal Code section 288(a)(c), on or about April 19th, 1985, in case No. A533100, in Superior Court of Los Angeles Judicial District of the State of California?

"[APPELLANT]: It was my married wife. We had a trial by judge. And, yes, I had oral copulation with my wife, never a child. . . . "

In response to this court's invitation for supplemental briefing the attorney general conceded that "the question of whether the victim of appellant's 1985 conviction of oral copulation was under 16 years of age, as required by Penal Code section 647.6, subdivision (c)(2) to elevate the crime to a felony, remained unproven at trial."[5]

Since appellant's prior conviction does not constitute an element of the offense of annoying children and proof of this allegation only affected punishment, appellant was entitled to stipulate to it. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480 [allegation of prior conviction not an element of charge of petty theft with prior]; *People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [allegation of prior conviction not an element of charge of indecent exposure with prior].) The problem here, however, is that the stipulation did not constitute proof of the prior conviction alleged against him because the age of the victim was not established.

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[5] The attorney general also conceded that the issue has been preserved on appeal "under the rubric of ineffective assistance of counsel, i.e., if the issue is recast as defense counsel's failure to argue at sentencing that the sentencing factor had not been proven."

The attorney general argues that the issue of proof of the prior conviction should be remanded to the trial court for it to determine whether the prior conviction alleged here involved a minor under 16 years of age. The attorney general argues, further, that appellant invited error by his artful response to the prosecutor's inquiry, quoted above, thereby preventing the prosecutor from proving the truth of the allegation. Relying on *People v. Witcher* (1995) 41 Cal.App.4th 223, 234, the attorney general contends that appellant received the benefit of not having his prior conviction presented to the jury and should not be allowed to successfully contend, after-the-fact, that his stipulation did not constitute proof of the prior allegation.

Appellant's counsel on appeal points to the absence of evidence that appellant's wife, the victim of appellant's prior conviction, was under 16 at the time the crimes were committed against her. His appellate counsel refers to the transcript of the preliminary hearing in the prosecution of that 1984 offense.[6] The victim in that offense testified that, as of the time of the preliminary hearing, she had been married to appellant for seven and a half years, and they had two children. Applying simple arithmetic, in order for the victim of appellant's prior conviction (appellant's former wife) to have been under the age of 16 years at the time appellant committed the violation of section 288, subdivision (a)(2), she would have been eight and a half years old or younger when they married.[7]

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[6] Appellant has requested that the appellate record be augmented with the preliminary hearing transcript of the 1984 offense. The offenses alleged in that prosecution occurred on November 6, 1984, and the preliminary hearing occurred on December 21, 1984. The trial court referred to this transcript in making its decision as to whether the felonies for which appellant was convicted in 1985 should be treated as separate strikes, and the transcript was admitted as an exhibit in the trial court. We have granted the request to augment the record to include the preliminary hearing transcript of appellant's 1985 conviction.

[7] "Q: You are the husband of Mr. Eckman?

"A: I am the wife.

"Q: My mistake.

Because there appears to be no possibility that the prosecution can prove that the prior conviction alleged in count 1 involved a minor under 16, remand would be a needless act. Since the prosecution failed to meet its burden of proof on the prior allegation, and cannot demonstrate that it can correct this failure on remand, we conclude that there was insufficient evidence of a felony violation. As such, the only sentence available to the trial court for the misdemeanor violation of section 647.6 was a fine of $5,000 and one year in county jail. The sentence of 25 years to life on count 1 was therefore improper and is ordered vacated.[8]

Although only a misdemeanor violation at most was shown, we briefly discuss whether sufficient evidence supported the jury's verdict on this count. Upon review of a challenge to the sufficiency of the evidence, "an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) Phrased in a slightly different way, "the reviewing court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence

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"A. Mine, too.

"Q. You have been married how long?

"A: May 27th will be eight years."

[8] In response to our request for supplemental briefing, appellant contends that the failure of his trial counsel to argue the inadequacy of the evidence of a felony conviction requires reversal for ineffective assistance of trial counsel. In light of our reversal of the sentence as to count 1, we need not address that issue since appellant has obtained the result he would have been entitled had his trial counsel timely raised the issue.

supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted.)

The jury was instructed pursuant to CALJIC 10.57:

"Defendant is accused in Count[] 1 of having violated § 647.6, subdivision (c)(2) of the Penal Code, a crime.

"Every person who annoys any child under the age of 18 years is guilty of a violation of Penal Code 647.6, subdivision (c)(2), a crime.

"In order to prove this crime, each of the following elements must be proved:

"1. A person engaged in acts or conduct directed at a child under the age of 18 years which would unhesitatingly disturb or irritate a normal person if directed at that person;

"2. The acts or conduct were motivated by an unnatural or abnormal sexual interest in the alleged child victims.

"It is not necessary that the acts or conduct actually disturb or irritate the child or that the body of the child be actually touched."

We have no difficulty finding that substantial evidence was presented to support appellant's conviction for this offense. The jury could easily find that appellant pursued the children in his car while naked except for a towel on his lap, with one hand below the towel. The children described appellant staring at them, and they were frightened. A reasonable jury could conclude that a normal person would be disturbed and irritated by appellant's conduct, and that the conduct was motivated by an abnormal interest in the children. (*People v. Thompson* (1988) 206 Cal.App.3d 459, 461, 466 [evidence sufficient to sustain a conviction for annoying or molesting a child when defendant repeatedly drove slowly past 12-year-old female, staring and gesturing at her by shaking his hand and moving his mouth as if whispering or pursing his lips].)

B. Prosecutor Misconduct

Appellant contends that the prosecutor committed misconduct requiring reversal because of remarks she made during argument to the jury.

In her final argument to the jury, the prosecutor stated the following:

"What do we know about the defendant? What do we know from his own mouth?

"That the defendant is a dangerous and violent man. That he was convicted of forcibly sodomizing his wife. And when I asked him if he was convicted of a felony, if he was convicted of sodomy with force, his answer was, well, it was my wife.

"And what else do we know about that event?

"That he was under the influence of cocaine at that time. So we know that cocaine exacerbates his violence, his dangerousness."

Appellant contends that these remarks constituted misconduct because they presented new evidence to the jury that had not been presented during the trial, i.e., that cocaine use had made appellant more violent and had impliedly caused him to commit the offenses for which he was being tried. Appellant further argues that the evidence of his prior conviction involving his wife was received for the limited purpose of impeachment, but the prosecutor used it to argue about appellant's bad character and propensity to commit the charged offenses.

Appellant concedes that there was no objection or request to admonish the jury, and that both are generally required in order to preserve the issue for appeal, but he argues that the issue has nevertheless been preserved. He argues that the harm was so egregious that timely objection and jury admonition could not have cured it. We disagree.

In order for a claim of prosecutorial misconduct to be cognizable on appeal a timely objection and request for jury admonition must have been made in the trial court. (*People v. Combs* (2004) 34 Cal.4th 821, 854; *People v. Maury* (2003) 30 Cal.4th 342, 418.) Although we find that the comments were improper, an objection could have cured any harm. These were mild comments made during a lengthy argument that was otherwise proper. Appellant's trial was not infected with the type of prosecutorial misconduct that has been found to be of such a nature that objection and request for jury admonition would have been futile. (*People v. Maury, supra,* 30 Cal.4that p. 418.)

Appellant also argues that his trial counsel's failure to object constitutes ineffective assistance of counsel. Again, we disagree. "[D]eciding whether to object is

inherently tactical, and the failure to object will rarely establish ineffective assistance. (*People v. Hillhouse* [(2002)] 27 Cal.4th [469,] 502; *People v. Scott* (1997) 15 Cal.4th 1188, 1223.)." (*People v. Maury, supra,* 30 Cal.4th at p. 419.)

Appellant admitted on cross-examination that he had previously been convicted of forcible sodomy of his wife, a felony, and that crime occurred while he was under the influence of cocaine. He also testified: "The cocaine is what created this whole mess, because the wife didn't want to be married to me anymore because of cocaine." This prior felony conviction was properly admitted for the purpose of impeachment, and appellant does not argue to the contrary. On direct examination, appellant testified extensively about his use of cocaine and its effects upon him at the time of his arrest in this case. Indeed, the use of cocaine was the reason he gave for being in the remote area of the park. He also testified: "I'm paranoid schizophrenic and bipolar. I was diagnosed mildly retarded by Patton Mental Institution." He further testified on direct examination that he was on parole at the time the events in the park occurred.

The prosecutor's remarks in closing argument, quoted above, went beyond merely commenting on the evidence and argued that the jury could infer from appellant's violent history that he was more likely guilty of the charged offenses here. This went beyond the purpose for which the evidence was received and, if considered by the jury, would constitute improper character evidence. We conclude, however, that the prosecutor's argument was harmless error. The evidence of appellant's guilt was overwhelming and "it is certain that any reasonable jury would have reached the same verdict even in the absence of the prosecutor's remarks." (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) Further, the jury was instructed that the comments of counsel are not evidence, and that appellant's prior felony conviction should not be considered for any purpose other than to determine his credibility. The jury is presumed to have followed the court's instructions. "We presume that jurors comprehend and accept the court's directions. [Citation.] We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions. [Citation.]" (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) It is not

reasonably probable that appellant would have obtained a more favorable result had the prosecutor not made these comments. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

As to appellant's claim that his trial counsel's failure to object resulted in ineffective assistance of counsel, there are plausible tactical reasons why his trial counsel did not object. As we have already discussed, appellant's defense to the child annoying charge was based upon his testimony that he went to the park and drove in the way he did so that he could smoke cocaine without being observed. His prior history of cocaine abuse tended to corroborate his testimony. The comments about appellant being a dangerous and violent man were supported by the evidence of his flight and combat with the police, and only became improper when tied to his prior criminal conviction. As we have said, the prosecutor's comments were rather mild. An objection would only have served to bring undue emphasis to them. This could well have been an occasion when trial counsel elected to "let sleeping dogs lie."

For a convicted defendant to succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel's performance was deficient resulting in prejudice. Appellant has failed to meet this test. (*Strickland v. Washington* (1984) 466 U.S. 668, 684–689, 691–696 [104 S.Ct. 2052]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.

C. Sentencing

DEFENDANT'S PRIOR CONVICTIONS

After the jury returned its verdicts, appellant waived jury on the allegation of prior convictions and the court conducted a bench trial. The prosecutor presented evidence and the trial court found true the allegation of four prior convictions from April 19, 1985 in case number A533100: One count of forcible oral copulation in violation of section 288, subdivisions (a), (c) and three counts of forcible sodomy in violation of section 286, subdivision (c). These convictions were alleged as four separate strikes pursuant to

sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i) [9], as well as a five-year prior serious felony conviction as to count 3 pursuant to section 667, subdivision (a)(1).

The prosecutor also presented evidence and the trial court found true the allegation of a prior felony conviction in case number KA030241 from March 20, 1997, for violation of Health and Safety Code section 11350, a one year prior alleged as to all counts pursuant to section 667.5, subdivision (b). Appellant does not challenge the sentences imposed by the trial court relating to the one-year and five-year prior convictions.

1. The Strike Priors

Appellant was sentenced on April 19, 1985 to the mid-term of six years in state prison. This was the result of his conviction of one count of forcible oral copulation in violation of section 288, subdivisions (a), (c), and three counts of forcible sodomy in violation of section 286, subdivision (c). The six year sentences on the three sodomy counts were concurrent to the sentence of six years on the count of forcible oral copulation. This conviction was the result of crimes appellant committed against his then-wife.

As discussed *infra*, M. D. Eckman, who was then married to appellant, testified in December 1984 at the felony preliminary hearing of the prosecution that resulted in the strike convictions. She testified that appellant was injecting cocaine on the night of November 6, 1984. She testified that appellant forcibly placed his penis into her mouth for less than a minute. She resisted and told him that she did not want to do this. He then told her: "Now you're going to get it, bitch," and forcibly sodomized her. She testified: "I was begging him to stop because it hurt; not only—I told him he was depraved, it

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9 "Penal Code section 667, subdivisions (b) through (i), is the codification of the Three Strikes law's legislative version (Stats. 1994, ch. 12, § 1). Penal Code section 1170.12 is the codification of its initiative version (Prop. 184, § 1, as approved by voters, Gen. Elec. (Nov. 8, 1994)). The two are 'nearly identical.' (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at p. 504.)" (*People v. Williams* (1998) 17 Cal.4th 148, 152, fn. 1.)

hurt." Appellant then looked through the entire apartment for a man, apparently believing that his wife was seeing another man who was hiding in the apartment. During this time he had his wife with him, holding her with his hand over her mouth. He then put her on the bed and forcibly sodomized her again. Then appellant got "real angry" and said that he was going to have to kill her "if he spent the rest of his life in prison." While physically restraining her, appellant rested for a while. He then forcibly sodomized her again. She testified: "He put his penis in my anus three times that night." Appellant tossed and turned for a while and then went to sleep. The next morning appellant had intercourse with Mrs. Eckman, after she had told him not to touch her. She testified that one hour separated the first and second acts of sodomy and 30 minutes separated the second and third acts of sodomy.

2. *Romero* Motion

Appellant moved to dismiss one or more of his strike priors under the authority of section 1385 and *People v. Superior Court (Romero), supra*, 13 Cal.4th 497 and *People v. Williams*, *supra*, 17 Cal.4th 148.

A trial court order dismissing a strike prior pursuant to section 1385 is reviewable for abuse of discretion. (*People v. Williams*, *supra*, 17 Cal.4th at p. 162.) The same standard of review is applied when a trial court refuses to strike or dismiss a prior under section 1385. "[A]s a matter of logic and fairness, the defendant should have the concomitant power to appeal a court's decision not to dismiss a prior under section 1385. . . . " (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) A review of the trial court ruling requires an analysis whether the defendant and the crimes for which he stands convicted fall within or outside the spirit of the Three Strikes law. "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and

prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth." (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.)

The trial court denied the motion, stating: "[I]n the analysis that we have to go through on this particular issue, *Romero* issue, as described by *Williams*, we're talking about the present felonies, the prior felonies, his background, character, and prospects. His prospects don't appear to be particularly good. Although not spelled out in *Williams*, the court believes that *Williams* court contemplated evidence of education, of possible job prospects, of personal improvements in some way that would demonstrate that this individual was outside of the spirit of three-strikes. I note that from the probation report, which we're going to get to later on, the defendant has been involved in criminal activities since 1978, a number of narcotics-related offenses, hypodermic needles, more narcotics offenses, assault with a deadly weapon, more narcotics offenses it doesn't appear that the defendant is making an effort to improve his character or his prospects. Based on the information that I've been provided, I cannot make the finding that the defendant is outside the spirit of three-strikes. Request to dismiss any or all of the prior strikes under *Romero* will be denied at this point."

We conclude that the trial court did not abuse its discretion in refusing to strike any of the priors pursuant to section 1385. "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First,'"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment

of the trial judge.’”’ [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 376–377.)

The record here shows that appellant was released from parole from his 1985 state prison sentence in January 1991. On December 24, 1992, he was convicted of assault with a deadly weapon, and apparently placed on probation. On March 20, 1997, he was convicted of possession of cocaine, and he was sentenced to seven years in state prison for that offense and the 1992 assault with a deadly weapon. He was paroled March 21, 2001. While on that parole, he was convicted of felony vandalism and sentenced to two years in state prison on June 14, 2002. He was paroled in July 2003 and then was in and out of prison on parole violations until his last release into the community on parole May 24, 2007. The instant offenses occurred on June 16, 2007, little more than three weeks from his last release on parole. This significant recidivist criminal history, including multiple convictions and violations of parole, amply supports the trial court’s denial of appellant’s *Romero* motion.

3. *Benson*/*Burgos* Motion

Appellant requested that the trial court dismiss or strike one or more of his four serious felony strike priors because they were the result of convictions in the same case and were the product of crimes committed against the same victim over a relatively brief period of time. He relied upon the cases of *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*) and *People v. Burgos* (2004) 117 Cal.App.4th 1209 (*Burgos*). The trial court denied the motion. We review the trial court’s decision for abuse of discretion. (*Benson*, *supra*, at p. 36, fn. 8.)

Our Supreme Court held in *Benson* that prior serious and/or violent felony convictions alleged as “strikes” are not subject to the restrictions of section 654.[10] The

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[10] Section 654 provides, in pertinent part, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that

Court concluded that the purpose of the Three Strikes law was that each prior conviction for a serious or violent felony would qualify as a separate strike, regardless whether the trial court in the earlier proceeding had stayed sentence on one or more of the priors pursuant to section 654. (*Benson*, *supra*, 18 Cal.4th at p. 31.) On the issue of the exercise of trial court discretion to strike a prior the *Benson* court went on to say: "Because the proper exercise of a trial court's discretion under section 1385 necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Id.* at p. 36, fn. 8.)

The court in *Burgos* addressed the situation in which the defendant's prior strikes resulted from the defendant's single act. The defendant's strikes were the result of a conviction of attempted robbery and attempted carjacking, both crimes committed by the defendant at the same time in an attempt to steal the victim's car. The current offense involved stealing shoes from a fellow inmate in a jail lockup and an assault on another inmate. The *Burgos* court concluded that the trial court abused its discretion in refusing to dismiss one of the defendant's prior strikes because the two offenses arose from the "single criminal act" of confronting the victim and demanding the victim's car and because the defendant's criminal history was relatively insignificant. (*Burgos*, *supra*, 117 Cal.App.4th at pp. 1216–1217.) *Burgos* is easily distinguishable from our case because of the nature of appellant's prior strike convictions, i.e., they did not arise from a "single criminal act," and because of his criminal history and future prospects.

We conclude that the trial court did not abuse its discretion in denying appellant's motion. Prior to ruling, the trial court reviewed the preliminary hearing transcript of

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provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

appellant's 1985 case. Although appellant's prior strike convictions arose from the same case and were crimes committed against the same victim, each was the result of separate and distinct acts committed during a period of eight hours. Each act of sodomy or oral copulation was separated in time, allowing appellant to reflect on his actions. Section 667.5, subdivision (b), as it existed at the time of appellant's 1985 conviction, permitted imposition of full consecutive sentences when "the perpetrator temporarily lost or abandoned the opportunity to continue his attack: such opportunity is lost when the victim becomes free of any ongoing criminal activity; it is abandoned when the offender keeps the victim within his control but engages in some significant activity unrelated to continuing his attack." (*People v. Craft* (1986) 41 Cal.3d 554, 561.) Here, there were significant periods of time when appellant abandoned his ongoing criminal activity yet kept his victim under his control and then committed other sexual assaults. Although appellant's conduct clearly would have supported imposition of consecutive sentences for at least two of the crimes, the trial court in the 1985 conviction elected to impose concurrent sentences for three of the four sexual assaults. Having considered the circumstances of the prior strike convictions as well as the circumstances of the present offenses, and having considered appellant's extensive criminal history, his violations of probation and parole, and his ongoing substance abuse, the trial court here properly concluded that the prior convictions should not be stricken.

4. Consecutive Sentences

Appellant contends that the trial court improperly imposed consecutive sentences in counts 2 (felony-evading an officer) and count 3 (assault with a deadly weapon on a peace officer). Section 667, subdivision (c)(6) and 1170.12, subdivision (a)(6) provide: "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count . . . ." Thus, these provisions mandate consecutive sentences for Third Strike defendants when convicted of felony offenses that were not committed on the same occasion and did not arise from the same set of operative facts. (*People v. Lawrence* (2000) 24 Cal.4th 219, 222–234 (*Lawrence*).)

Consecutive sentences are not required, but remain an option in the discretion of the trial court, when the current offenses share common acts or criminal conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 596.) Appellant contends that the trial court erred in concluding that the consecutive sentences were mandatory. He argues that these offenses were committed on the same occasion and arose from the same set of operative facts.

The trial court did not directly state its finding that counts 2 and 3, upon which consecutive sentences were imposed, were "not committed on the same occasion and did not arise from the same set of operative facts." In imposing sentence, the trial court stated: "The court is going to select the base term as to count 3. It will be a 245(c) and pursuant to the mandate of 1170.12(a) through (d) and 667(b) through (i), the court having found four strikes to be true, the defendant is sentenced to state prison for the period of 25 years to life as to that count, plus one year under 667.5(b), and five years pursuant to section 667(a)(1), for a total sentence as to this count of 31 years to life. Plus as to count 1, the 647.6(c)(2), pursuant to the mandates of section 1170.12(a) through (d) and 667(b) through (i), that will be 25 years to life. That will be consecutive. As to count 2, the 2800.2(a), pursuant to the mandates of section 1170.12(a) through (d) and 667(b) through (i), the court sentences the defendant to 25 years to life. That will be consecutive to the time previously imposed. As to count 4, the 69 Penal Code section, the court finds that runs 654 to the 245(c), 25 years to life, stayed pursuant to section 654."[11] We conclude that the trial court did not err in imposing consecutive sentences.[12]

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[11] Although the prosecutor argued in the trial court for consecutive sentences on each count, the People here do not disagree with the trial court's section 654 analysis as to count 4. Nor do we.

[12] Since we have already determined that appellant's conviction in count 1 was a misdemeanor and not a felony, it is unnecessary to discuss further the trial court's imposition of consecutive sentence for count 1. *Lawrence, supra,* 24 Cal.4th 219 makes clear, however, that, had count 1 been a felony, the Three Strikes law would mandate sentence on that count to be consecutive to the sentence on the other offenses of which appellant was convicted.

The phrase "committed on the same occasion" was interpreted in *People v. Deloza*, *supra*, 18 Cal.4th at p. 595, to mean "at least . . . a close temporal and spatial proximity between the acts underlying the current convictions." There, the defendant had entered a store and robbed four victims within a brief period of time. The court concluded that these crimes were committed on the same occasion, and, even though section 654 did not preclude consecutive sentences, the Three Strike law in that circumstance did not require consecutive sentences, i.e., the trial court was required to exercise its discretion in determining whether the sentences should be consecutive or concurrent. (*Id.* at p. 596.)

The phrase "not committed on the same occasion and did not arise from the same set of operative facts" was discussed further in *Lawrence*, *supra*, 24 Cal.4th 219. In *Lawrence*, the defendant, charged as a Third Strike offender, committed a petty theft from a store, fled one to three blocks to the yard of a house and then attacked the house's occupants in the yard. The court held: "Applying the 'close spatial and temporal proximity' test of *Deloza*, we conclude the aggravated assault . . . , perpetrated two to three minutes or more after the theft from the market, at a location one to three blocks away (depending upon the flight route taken), was 'not committed on the same occasion' as the theft within the meaning of section 667, subdivision (c)(6)." (*Id*. at p. 229.) The court rejected the argument that crimes committed during flight from an earlier crime are committed on the same occasion. "We do not believe it was intended that the mandatory consecutive-sentencing provision of the three strikes law not apply to the commission of different crimes perpetrated against different groups of victims merely because the later crimes occurred while the defendant was still in flight from the initial crime scene. No principle of criminal law shields a defendant from conviction of all such offenses, nor does section 654 prohibit multiple punishment for crimes of violence against multiple victims." (*Ibid*.)

The court then addressed whether the offenses did or did not "arise from the same set of operative facts" and concluded that they did not. The court found that the words "same set" "'import[] the same . . . closeness in time and location as the phrase "same

occasion.”’” (*Lawrence*, *supra*, 24 Cal.4th at p. 230.) The court further concluded that the word “operative” carries an “ordinary and common definition” of “producing an appropriate or desired effect; exerting force or influence” that “is consistent with prior judicial constructions of that term finding it refers to the facts of a case which prove the underlying current charged offense.” (*Id*. at p. 231.) The court cited with approval the following language from *People v. Durant* (1999) 68 Cal.App.4th 1393, 1405–1406: “[W]here the elements of the original crime have been satisfied, any crime subsequently committed will not arise from the same set of operative facts underlying the completed crime; rather such crime is necessarily committed at a different time.” (*Lawrence*, *supra*, 24 Cal.4th at p. 232–233.) The *Lawrence* court went on to define “same set of operative facts” to be events “sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses of which defendant stands convicted.” (*Id*. at p. 233.)

Here appellant was sentenced consecutively for the assault with a deadly weapon on a peace officer in count 3 and felony-evading a peace officer in count 2. The victim of the assault was Officer Sigala, who appellant attacked with a piece of bamboo. Officer Sigala was also one of the officers involved in the pursuit that resulted in the felony evading charge. As we have described, the pursuit by the police went for about one-half mile. When it ended, the officers confronted appellant and ordered him out. When he did not comply, Officer Chambers broke the car windows, and then sprayed appellant with pepper spray. Appellant eventually exited his vehicle and ran down the ravine with the officers in pursuit. The officers and appellant then fought at the bottom of the ravine. The police officers testified that appellant put up resistance and “never wanted to stop.” When Officer Chambers was left alone with appellant, appellant continued to fight for 40 minutes until the other officers, including Officer Sigala, returned. Chambers testified that appellant had continued to resist and fight. When the other officers returned, appellant was “tased” more than once, then he grabbed a piece of bamboo and stabbed at Sigala, injuring Sigala’s wrist. When appellant assaulted Officer Sigala, both were in a different location from where the vehicle pursuit had ended and at least 40 minutes

separated the two criminal acts. From these facts we conclude that the criminal acts of evading police and assault, for which the trial court imposed mandatory consecutive sentences, did not share the close temporal or spatial proximity of acts having been "committed on the same occasion."

We now turn to a discussion of whether the two criminal acts arose "from the same set of operative facts." The offense of felony evading had been completed when the assault occurred. Appellant was no longer driving the Camry and the police were no longer chasing in their marked patrol cars. When Officer Sigala was assaulted, appellant was out of the car and fighting with the police. Violation of the Vehicle Code was long over, since the crime of evading requires that the suspect operate a motor vehicle, with "intent to evade," that the suspect "flees or otherwise attempts to elude a pursuing peace officer's motor vehicle," and "the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property." (See Veh. Code, §§ 2800.1 and 2800.2.) In the language of the Supreme Court, the "offense [was] completed in the eyes of the law." (*Lawrence*, *supra*, 24 Cal.4th at p. 233.)

Lawrence, supra, 24 Cal.4th 219 tells us that "same set of operative facts" refers to events "sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses of which defendant stands convicted." (*Id.* at p. 233.) In this instance, it is true that the crimes of assault with a deadly weapon on a peace officer and felony-evading a peace officer both involved the same police officer's interaction with appellant. In the former, Officer Sigala was the victim of appellant's assault. In the latter, Officer Sigala was one of the officers involved in the pursuit.[13]

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[13] Although the pursuit involved multiple police officers in multiple police vehicles, appellant's liability for felony evading constituted a single offense. (*People v. Garcia* (2003) 107 Cal.App.4th 1159,1163 ["The instant evading was equally deplorable whether appellant was pursued by one police officer, three police officers, or the entire police force. Here the evading was an uninterrupted single course of conduct, i.e., one continuous act of driving lasting 30 minutes. The statutory language . . . contemplates a continuous course of driving, which may transpire over a short or long period of time."].) It is questionable, however, whether Officer Sigala was the "victim" of the crime of

Appellant's delay in exiting the car, then running down into the ravine and continuing to resist arrest were acts so separate from the pursuit that the assault shared no elements with the crime of evading. Appellant may have had the same state of mind throughout, i.e., to escape capture. Appellant's desire to escape, however, is not an element of the crime of assault and cannot bring the latter crime into the same set of operative facts as the completed crime of evading a peace officer. The elements of the crime of felony-evading had been satisfied well before appellant's assault on Officer Sigala. Consecutive sentences here were mandatory and the trial court did not err in imposing them.

DISPOSITION

The judgment is affirmed, and the matter is remanded to the trial court to resentence appellant on count 1 as a misdemeanor.

NOT TO BE PUBLISHED.

WEISBERG, J.*

MALLANO, P. J.

ROTHSCHILD, J.

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evading. A vehicle pursuit may victimize anyone, whether it is a peace officer or civilian, pursuer or bystander, who happens to be endangered by the chase.

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.